DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRBs0375/1dn
JEO:jlg:jf

March 7, 2000

Dan Rossmiller:

I have had to do this amendment and drafter's note quickly, so I have not had time to think all of these issues through as completely as I would have liked. There may also be other issues raised by the language of the draft that will bear further thought. However, please note the following when reviewing this draft:

1. The suggested language that you sent to me for proposed s. 974.07 seemed to be an amalgamation of the Illinois statute (725 Ill. Comp. Stat. 5/116–3) and the pending U.S. Senate proposal (S. 2073). I made a number of language changes for purposes of conforming to current drafting style. Also, note the following when reviewing proposed s. 974.07:

a) The draft does not explicitly address the relationship between motions under proposed s. 974.07 and other postconviction proceedings. Nor does it explicitly address the issues of successive motions under s. 974.07, though presumably they are allowed as long as the motion otherwise meets the criteria specified in proposed s. 974.07 (2). Lastly, the draft does not address what happens after evidence is tested and appears to exonerate the person or at least make it reasonably probable that the outcome of the original case would have been different. Does the person have to make a separate motion for a new trial or other postconviction relief and, if so, what procedure should be used? (Note that the U.S. Senate proposal goes into more detail on the issue of post–testing procedures.) Also, note that, if the person's motion is denied, he or she will presumably be able to appeal and it appears that the appellate rules under s. 809.30, stats., would apply. Is that your intent, or should s. 809.30 (1) (a), stats., be amended to exclude motions under proposed s. 974.07?

b) Proposed s. 974.07 (3) does not cover persons who are not incarcerated but who want to get testing done to challenge a conviction because, for instance, the conviction constitutes a "strike" under the "three strikes, you're out" law or keeps the person from owning a gun or getting a job or an occupational license of some sort. It also doesn't cover juveniles subject to ch. 938 or persons found not guilty by reason of mental disease or defect and committed under s. 971.17, stats.

c) The draft defines "government agency" to include federal agencies. Even though the district attorney would be acting under proposed s. 974.07 (4), I am not certain that we can force a federal agency to follow an order from a district attorney to preserve evidence in its possession.

d) Proposed s. 974.07 (3) requires that the DA get notice of the motion from both the person filing the motion and the court. Is that your intent? Also, should proposed s. 974.07 provide for notice to victims that a motion has been made?

e) Like the Illinois statute, under proposed s. 974.07 (5) (a) the person filing the motion has to make a prima facie showing that identity was an issue in the case and that there is a chain of custody that establishes the evidence hasn't been tainted. Unlike the suggested language, this draft does not require a prima facie showing that the testing may produce noncumulative, exculpatory evidence because that requirement was virtually identical to proposed s. 974.07 (5) (b). Also, what is the significance of the person's prima facie showing? Is the DA allowed to rebut that showing? If so, must the motion be denied if the DA rebuts the prima facie case or could the person then put on additional evidence? Should the draft just say that the court must determine whether identity was an issue, whether the chain of custody was good and whether the testing will produce noncumulative, relevant evidence, and leave it at that? Also, should the draft specify a burden of proof for the court's determination, or is that unnecessary?

f) With respect to identity being an issue in the case, what if the person needs other material that is not otherwise readily available in order to make that showing (e.g., trial transcripts)? Should the draft address the need for and discovery of such material?

g) Proposed s. 974.07 (5) (b) refers to the person's assertion of actual innocence or wrongful conviction, but nowhere does the draft require the person to make such an assertion in his or her motion. Should the person be required to make that assertion in his or her motion? I suppose that as a practical matter he or she would do so anyway, but it is odd to have the statute refer to an assertion that, strictly speaking, the person is not required to make. Also, proposed s. 974.07 (5) (b) refers to "new" evidence; does that open up the argument that retesting of previously tested material is not really "new" evidence? Should the draft amplify what is meant by "new" evidence, or, alternatively, would it work just to refer to relevant, noncumulative evidence? Lastly, the language refers to evidence that is "materially relevant". Isn't it sufficient to say "relevant"? In Wisconsin relevancy already incorporates the notion of "consequential facts" (i.e., materiality), and in any event the use of the term "material" seems to be disfavored. See s. 904.01, stats.; *State v. Sullivan*, 216 Wis. 2d 768, 786 n.15 (1998).

h) Like the Illinois statute, proposed s. 974.07 (5) (c) requires that the testing employ a generally accepted scientific method. This language essentially restates the test for admissibility of scientific evidence in federal courts that was set out in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). *Frye* is no longer the rule in federal courts and has never been the rule in Wisconsin courts. See, most recently, *State v. Donner*, 192 Wis. 2d 305, 315–16 (Ct. App. 1995), citing *State v. Walstad*, 119 Wis. 2d 483, 518–19 (1984). Is it your intent to use the *Frye* standard to evaluate tests done under proposed s. 974.07 even though that standard is not used to determine admissibility of the evidence in court?

i) Unlike the suggested language that you sent to me, proposed s. 974.07 (6) does not provide that the court's may impose conditions on testing to protect "the state's

interest" in the integrity of the evidence and the testing process; instead, this draft leaves out the reference to the state's interest because it seems that the defendant also has an interest in the integrity of the evidence and the testing process. Okay? Also, please carefully review the language of proposed s. 165.77 (2m) relating to testing by the state crime labs. It is based on s. 165.77 (2), stats. Does that language do what you want it to do?

j) 1. Proposed s. 974.07 (7) says that a court "may" refer a person who claims or appears to be indigent to the public defender for an indigency determination. Should it say "shall" instead of "may", given the potential constitutional dimension of the issues involved in the proceeding? Compare s. 974.06 (3) (b), stats.

2. Should the provisions relating to the preservation of biological material also cover fingerprint evidence? Should they also require preservation of reports of earlier test results that are conducted on the material or evidence (so that, for instance, people can compare the earlier and later test results)? Also, if someone does file a motion under proposed s. 974.07, what happens when that motion has been disposed of? Can the custodian then destroy any remaining evidence or does he or she have to go through the notice procedure again?

3. Please review the language of proposed s. 939.74 (2d) (b) carefully to make sure that it does what you want it to do. Also, note that the definition of "deoxyribonucleic acid profile" refers to the definition in s. 972.11 (5) (a), stats., which refers to a DNA analysis that uses "the restriction fragment length polymorphism analysis of deoxyribonucleic acid". Thus, the definition will apparently not cover polymerase chain reaction testing results. Should the definition in both proposed s. 939.74 (2d) (a) and s. 972.11 (5) (a), stats., be changed to cover methods of analysis other than restriction fragment length polymorphism?

Please let me know if you have any questions or changes.

Jefren E. Olsen
Senior Legislative Attorney
Phone: (608) 266–8906
E–mail: Jefren.Olsen@legis.state.wi.us